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1 take final argument in any order that you wish.

2 Do you want to start, Mr. Iannuzzi?

3 MR.IANNUZZI: Can we have about two minutes
4 before we start the argument?

5 THE COURT: Sure, take whatever time you need
6 and let me know when you are ready.

7 MR.IANNUZZI: Yes, sir.

8 (pause)

9 MR.IANNUZZI: Your Honor.

10 THE COURT: Yes, Mr. Iannuzzi?

11 MR.IANNUZZI: In connection with the hearing,
12 of course, I will not get into any aspects that are not
13 before the Court at this time, based on your Honor's
14 ruling, and limit myself to the voluntariness of the
15 statement both under the Huntley and Miranda
16 applications.

17 Basically I point out to the Court my view
18 that the evidence is insufficient to permit the Court
19 to utilize, or to permit the district attorney to
20 utilize the statement. And I suggest to the Court that
21 the statements are the essence of the People's case,
22 and therefore scrutiny must be that more strict in a
23 situation where there is no other evidence except for
24 these statements.

25 In the first instance the defendant does have

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1 some minimal obligation to come forward, and we have
2 done that. We have come forward, and it is the burden,
3 if you will, of the district attorney -- of the
4 Prosecution to justify, or vouch for the
5 constitutionality of the statements having been taken
6 in an appropriate fashion. And I don't believe that
7 that has been shown in this case.

8 Indeed other than the fact that Detective
9 Bavolar gave a curbside opinion that he thought that
10 Mr. Millington was sufficiently aware of his
11 surroundings and what was happening, other than that
12 the Prosecution has come up with nothing whatsoever to
13 establish that these statements were voluntarily and
14 knowingly given.

15 Now, without the defendant, of course, that
16 might have flown. But the defendant, and the objective
17 facts, speak towards -- and the People and the police
18 had an obligation to do something more when they knew
19 that the defendant was inebriated, intoxicated, under
20 the influence of something -- alcohol, narcotics or
21 something to that effect.

22 They knew that because they picked him up at
23 4 or 5 o'clock in the morning after the hours that bars
24 had closed and allegedly he was still in the bar.

25 I say allegedly because the defendant

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1 indicates that he had been kicked out of the bar at
2 some point that evening.

3 Was he in the bar, or was he in his car? I
4 don't know. But assuming that the story is that --
5 because they say they dragged him out of his car -- did
6 they see him come out of the bar, or was he in the
7 parking lot across the street in the car? I don't know
8 that it makes a great deal of difference except from a
9 view of credibility.

10 But we do know he was under some influence at
11 that time.

12 Now we have to skip forward about five or six
13 hours, and we have to get to the point where the police
14 say that they took a statement from the Defendant
15 Millington, and that's People's Exhibit 6. And the
16 statement indicates, or it purports to be a confession
17 to a crime that took place in July -- July 20th, I
18 believe, of the year 2000.

19 And in it the defendant indicates that at
20 that time -- that is to say at the time of the event--
21 he was drinking, smoking P.C.P. and taking cocaine.
22 And now they have apprehended somebody, who is
23 obviously under the influence of something, and they
24 have taken no steps whatever, despite the facilities of
25 the police department of the City of New York, and

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1 these are significant facilities -- for example, the
2 officer, or Detective Bavolar said, well, tell me where
3 you threw the gun and we can have SCUBA divers come
4 with a helicopter, jump into the water and search for
5 the weapon.

6 That would be significant because that would
7 be evidence. So they can do that.

8 But when it came to determining was this
9 person, who was allegedly making a statement, fully
10 conscious, fully sober, capable of knowingly and
11 voluntarily making decisions in reference to Miranda,
12 knowingly and voluntarily capable of making decisions
13 in confessing to a crime, knowing that this evidence
14 was being taken for the purpose of it's integrity and
15 presentation in a court of law, they did absolutely
16 nothing with the person that they knew was inebriated,
17 except for Bavolar, who is a layman, to say, I thought
18 he was okay. Yeah, he looked okay to me.

19 What does -- and with greatest respect for
20 Detective Bavolar -- what does he know about it?

21 Meanwhile I asked him if they had the
22 facilities, and he said in a cavalier fashion--and I
23 think the word cavalier will appear a couple of more
24 times--but in a very cavalier fashion, "Oh, the highway
25 department does that."

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1 They have the facilities to stop people
2 driving in the street and determine if they have point
3 zero one, point zero 2, point whatever to determine if
4 they violated the sections of the vehicular law, and to
5 arrest them for driving under the influence or while
6 intoxicated, depending on the amount.

7 And yet not a single thing was done. How
8 hard would it be?

9 We don't do that.

10 Well, that's first of all. I can't believe
11 it. It is shocking. It is shocking to think that the
12 police department would say, knowing that they have
13 somebody who is allegedly confessing to being high at
14 the time of a murder-- who was indeed high, to say
15 that's okay, we don't have to have a chemical test.

16 You know, if we went downstairs, or if we
17 went across the street to the Criminal Court and
18 someone was presenting a case to say that this man was
19 or was not under the influence, it would be thrown out
20 in the snap of a finger if the officer said, "We don't
21 bother with that. Highway does that. We didn't bother
22 doing that but the guy was drunk."

23 The Court would laugh you out.

24 But to say he was sober and to confess to a
25 murder, that's okay. All you need is the opinion of an

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1 uninitiated -- yes, he has been to parties, he has
2 walked down the street, and he has made arrests when he
3 was a uniformed officer of people who are obviously are
4 falling down.

5 The question is not whether a person is
6 falling in the street. This is a question of whether a
7 person can knowingly and voluntarily make a decision
8 about his Miranda rights, and knowingly and voluntarily
9 confess to a criminal act. And when it came to the
10 highest crime in the State of New York, the police's
11 attitude was, "He looked okay to me."

12 That wouldn't fly in the Criminal Court on a
13 DWI.

14 Now, I suggest that that cavalier attitude
15 was carried further.

16 Where is your memobook? I didn't write
17 anything down. I know I didn't write anything down. I
18 didn't bother writing anything down. Even if I have a
19 memobook, I didn't write anything down.

20 Because the regulations, I asked Detective
21 Green, what are the regulations in reference to the
22 memobook? You have to keep one.

23 But this officer knows absolutely for sure
24 that any memobook that he has, whether he looks for it
25 or not, won't have any notations in reference to his

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activities. So that basically an officer in a blue uniform couldn't get away with that cavalier attitude.

And yet in reference to a homicide case, "He looked okay to me." "I didn't bother with a chemical test even though I knew he was drunk." "I didn't bother making notes in my memobook." "He voluntarily confessed to me." And that's the basis that you are being asked to make a determination. And it's a very significant determination, because without this evidence, Judge, this case will not -- cannot fly.

And it can't be cavalierly viewed as well, the cops said that it's okay, therefore it must be okay.

I suggest to your Honor that the law is that the People have the obligation of justifying the constitutionality of their offer, and there has been nothing at all.

I'm not saying what they offered is weak. I'm saying they didn't offer anything at all.

Now we have. The defendant took the stand. The defendant said that he was high. And you know what, Judge? His statement, his testimony is confirmed by the police officer. He said he was high. He said he was drunk.

The objective fact is he was taken out of a

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1 bar, or sleeping in his car, or where ever it was, at 4
2 or 5 in the morning. The bars I understand have to
3 close at 3. So therefore the defendant, based on an
4 objective viewing of the defendant, was inebriated, or
5 under the influence of something, both by way of the
6 observation of the police officer, by way of the
7 testimony of the police officer, by way of the
8 defendant himself.

9 Now, under those circumstances the People
10 have to come forward and show that that wasn't the
11 case.

12 The People haven't come forward with one iota
13 of evidence, and that is not -- it isn't the defendant
14 who has to prove that he was drunk. The People have to
15 prove that what they are offering was knowingly and
16 voluntarily made.

17 They haven't proven that at all. Not even
18 have they made an attempt at it. And so I suggest to
19 the Court that the Court cannot, just as the People
20 cannot rely upon the assumption of normal sobriety,
21 they can't do that because the officer -- the detective
22 doesn't know this defendant, never saw him before, and
23 doesn't know what his normal demeanor is or was.

24 Moreover in a situation where the defendant
25 looks drunk, acts drunk and is taken out of a bar at 5

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1 in the morning and confesses to a crime that was
2 allegedly committed, according to the statement that
3 was taken from him, when the defendant was taking
4 various drugs, it becomes more significant for the
5 People to come forward with evidence to justify that
6 indeed he did know.

7 Now, what argument are the People going to
8 give? Only that Detective Bavolar said he looked okay
9 to me. And that's not sufficient, Judge, particularly
10 in this day and age with the sophisticated equipment
11 that is available within a baseball throw of this
12 courthouse, and within a baseball throw of the 47th
13 Precinct to make that determination.

14 Blow into this tube. Blow into this balloon.
15 And that the police department doesn't have that in
16 every precinct is shocking. But let's assume they
17 don't. They had it in Highway 1, and Highway 1 is
18 right over there on the Bronx River Parkway.

19 Their whole headquarters is there. I am sure
20 at 4 or 5 in the morning it would take no more than
21 five minutes, not ten minutes, to get the equipment
22 over.

23 Know why they didn't, Judge? Well, I'll take
24 a wild guess. They didn't get the equipment because it
25 would have shown that the defendant was chemically,

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1 objectively, medically under the influence of drugs or
2 alcohol and they didn't want that. It's as simple as
3 that. They did not want the objective facts to be
4 shown. And so they ignored it, and they have Detective
5 Bavolar get up and say he looked okay to me.

6 That's not the test. That's not the test at
7 all. The question he must be knowing and voluntary.

8 The law doesn't say that it appears that he
9 is knowing and voluntary. It is that he must have
10 knowingly and voluntarily.

11 When you take a plea you would ask the fellow
12 if he has had any drugs or narcotics or under the
13 influence of anything prior to his allocution. And if
14 he said --

15 THE COURT: I usually don't do that. I size
16 up the reaction of the defendant.

17 MR.IANNUZZI: Well, I have been in courts
18 that have done it.

19 THE COURT: I know some people do do it.

20 MR.IANNUZZI: And it is done very often, and
21 if the fellow were to say to you, by the way, Judge,
22 while I look terrific, I have been drinking all night,
23 and I have been doing cocaine, I have been doing
24 P.C.P., I would think that the reasonable response
25 would be, I think we will take this tomorrow, because

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1 we are not going to take one where you have the
2 possibility of somebody being under the influence.

3 And I suggest that they knew that he was.
4 And went out of their way not to have the objective
5 evidence. Particularly when the facilities are at
6 hand.

7 And the statement does not speak for itself,
8 because we are not here to determine the content of the
9 statement. We are here to determine whether or not the
10 statement was voluntarily made, whether the Miranda
11 rights were voluntarily waived, and that can only be
12 done by a knowing conscious waiver. And knowing and
13 conscious means that the man is not impaired. And
14 impaired, no matter how you look at it, could have been
15 readily determined by that equipment that has been
16 designed for police work to determine whether or not a
17 human being is under the influence, or has his
18 capacities diminished and impaired. And they
19 specifically went out of their way not to do that
20 because they knew he was under the influence.

21 And I suggest to your Honor under
22 circumstances like that, there is an additional measure
23 that the police and the district attorney now have to
24 come forward and say we proved that in fact that at
25 that moment, and at that time he wasn't. And I suggest

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1 to your Honor that they haven't done anything to that
2 effect, nor can they.

3 And I would say that under those
4 circumstances, it can't be that this Court ignores that
5 information and says, well, -- and the only think you
6 can rely on is Bavolar saying he looked okay to me, and
7 looking okay and having an actual impairment are two
8 completely different things.

9 As such I believe that the statement --

10 First of all, the Miranda warnings were not
11 appropriately waived by this defendant because of his
12 incapacity at the time. The statement, according to
13 both the physical reality and the defendant's statement
14 that in fact they were telling him because he doesn't
15 remember and didn't remember that they were telling him
16 and writing things down, and the very fact that he
17 didn't put anything on the paper except his signature,
18 he looks at the signature and says, well, it looks like
19 my signature, but frankly it isn't my normal signature.
20 But it looks like it.

21 There is not an initial on the page. He
22 didn't write it out.

23 Judge, the police did everything in this
24 case, and the defendant says they put the words in my
25 mouth. It therefore creates sufficient cloud requiring

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1 the People to come forward with more than nothing.
2 They cannot rely upon the normal assumption of sobriety
3 and knowledge where in fact something has been raised
4 to show that that was not the case.

5 Thank you, sir.

6 THE COURT: Thank you, Mr. Iannuzzi.

7 Mr. Smith?

8 MR. SMITH: Your Honor, unless there is any
9 particular point that the Court wishes me to address,
10 I will rest on the record.

11 THE COURT: I have no particular questions
12 for you, no.

13 Thank you.

14 MR. SMITH: Fine.

15 THE COURT: Thank you.

16 People?

17 MR. MC CARTHY: Judge, I am comfortable with
18 the record here, but I just would like to suggest a
19 couple of things to your Honor.

20 One is that with respect to both defendants
21 and their written and oral statements, I believe it is
22 clear from the record that they were properly advised
23 of the so called Miranda warnings, and made knowing and
24 intelligent waivers with respect to Detective Bavolar
25 and, I guess, Green.

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1 We also had an opportunity yesterday
2 afternoon to view the videotaped statements, Judge.
3 And I think if it can be said that the truth of the
4 statement that seeing is believing was borne out in
5 this courtroom, that happened yesterday.

6 You recollect, I am sure, that the defendant
7 Stallings on the video not only affirmed his original
8 written statement, and his waivers, and his advisement
9 of the Miranda warnings, but actually spoke on the tape
10 to the effect that he had been treated fairly and
11 decently by the police, and he had been fed.

12 And you will recollect as well the defendant
13 Millington also affirmed both the Miranda warnings and
14 the statement to ADA Alaqua on that videotape.

15 With respect, of course, to the issues raised
16 by Mr. Iannuzzi, I think the essential judgment that
17 your Honor has to make is a credibility determination,
18 and, frankly, having heard his direct testimony, it was
19 one of those cases where you really wonder whether you
20 should cross examine him or not, since it is my
21 opinion, and I think the record supports the fact that
22 his testimony was essentially devoid of credibility, and
23 crafted to deal with the issues of this trial.

24 He certainly remembered what helps him and
25 couldn't recall what did not.

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1 But perhaps most significant of all, having
2 had a chance to see the video, and having had a chance
3 to see him here in the courtroom, the first question I
4 asked him was not a facetious one. He looked better on
5 the video than he did in this courtroom being
6 questioned about this particular case. And under the
7 standard enunciated by this defendant, I think under
8 those circumstances we were probably all remiss in not
9 giving him a Breathalyzer test before he took the stand
10 here, because, you know, he looked better there than he
11 did here.

12 And you know what. I just don't think it
13 flies. I don't think the credibility judgment falls on
14 his behalf. I think it falls on behalf of the
15 Prosecution's case, and I ask the motion be denied in
16 it's entirety.

17 MR.IANNUZZI: May I have twenty seconds?

18 THE COURT: Thank you, Mr. McCarthy.

19 Yes.

20 MR.IANNUZZI: I think what the district
21 attorney has asked you is that he thinks that it falls
22 on the side of the Prosecution. But it isn't a
23 question of which side is fairer, which attorney is
24 better.

25 It really falls on what did the evidence

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1 show, and there is no evidence on behalf of the People
2 as required by the Constitution of the United States
3 and the State of New York to bear out their burden of
4 showing the constitutionality of the statements having
5 been -- and I thank Mr. McCarthy for the word that I
6 didn't put -- I put "voluntarily" -- consciously and
7 voluntarily.

8 But there is another one. Intelligently
9 made. And there is no proof that that was done.

10 So it isn't a question that it is a good idea
11 for the prosecution to carry or use to carry. The
12 question is what does the evidence show, and the
13 evidence that the People have put up does not support
14 their burden of showing constitutionality.

15 Thank you.

16 next page
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1 THE COURT: Thank you Mr. Iannuzzi.
2 Anything further from anyone?

3 MR. MCCARTHY: No, sir.

4 MR. IANNUZZI: No, sir.

5 THE COURT: I'm going to take a
6 little time to consider your arguments and the
7 testimony at the hearing, and the physical
8 exhibits, and then I'll give you a decision
9 shortly.

10 You can take a break if you want,
11 about fifteen, twenty minutes.

12 (Whereupon there was a brief recess
13 in the proceedings.)

14 COURT CLERK: Hearing continued, all
15 parties are present.

16 THE COURT: This hearing was held to
17 determine the admissibility of certain
18 statements attributed to each defendant that
19 the People seek to offer at trial.

20 At this hearing, the People bear the
21 burden of establishing, beyond a reasonable
22 doubt, the voluntariness of any and all
23 statements so offered, and the knowing,
24 intelligent, and voluntary waiver of the
25 Constitutional rights commonly referred to as

Miranda rights associated with the right to remain silent and the right to counsel.

With regard to these issues, I heard testimony from two detectives, two retired detectives, Detective Thomas Bavolar and Detective Maureen Green, both formerly of the 47 Precinct. And I also heard testimony from defendant Devon Millington.

The Court, at a hearing of this nature, must make factual determinations, factual findings, which requires an assessment of credibility of witnesses.

I observed all the witnesses who testified, and I have assessed their testimony and the reasonableness of it, and I ascribe credibility to Detective Bavolar and Detective Green with regard to assertions made by Mr. Millington, Devon Millington. I reject his assertions on the issues I must decide, and find him not credible in that regard.

With regard to findings of fact and conclusions of law, I find, essentially, the following:

That at issue are five statements,
three made during questioning by the police and

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1 two during questioning by an Assistant District
2 Attorney during a videotaped session.

3 Chronologically, from the credible
4 evidence, the Court has learned that on July
5 20th, of the year 2000, a homicide
6 investigation was initiated because the
7 bartender at a place known as Bill & Bob's Bar,
8 located in the Bronx, was shot to death and
9 money taken during a robbery, and a police
10 investigation began seeking patrons at that
11 particular establishment who might throw some
12 light on the perpetrators, or who the
13 perpetrators were.

14 On July 21st, which would be the day
15 after the crime was committed, Anthony
16 Stallings was interviewed by Detective Bavolar
17 at the 47th Precinct. This, the Court finds,
18 was not a custodial situation. Mr. Stallings
19 was not in custody, he was not under arrest, he
20 was free to leave, and although I don't recall
21 any specific testimony on the subject, I
22 believe he did leave after the interview,
23 having heard nothing to the contrary, and under
24 any test whatsoever would not have considered
25 himself in custody, under the circumstances in

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1 existence, if innocent of the particular
2 crime.

3 As such, no Miranda warnings were
4 required, nor given, and the information
5 related to Detective Bavolar, in the form of an
6 admission, concern the events of that
7 particular night, July 20th, 2000, and is
8 reflected in a DD5 report completed by
9 Detective Bavolar and from which he refreshed
10 his recollection.

11 I find that those statements were
12 made pursuant to a normal police investigation
13 and were non custodial in nature, and were
14 voluntarily provided, and as such, the People
15 have met their burden of establishing the facts
16 just mentioned in the statement, and is
17 admissible at trial.

18 On October 6, Mr. Stallings was once
19 again at the 47th Precinct, but this time in
20 custody. There is no issue on the fact that
21 any questioning that occurred on this date
22 involving defendant Stallings was custodial in
23 nature.

24 The Court finds that prior to any
25 custodial questioning he was advised of his

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rights pursuant to the Miranda decision, and other cases that will require the rights to be explained to a defendant, and that the defendant knowingly and intelligently and voluntarily waived his Fifth and Sixth Amendment rights.

I find beyond a reasonable doubt that the rights were administered. In this case I believe they were administered by Detective Green, as testified to by Detective Bavolar, again refreshing his recollection from Detective Green's paperwork, and that the statement given was a voluntary statement.

With regard to the next event, it occurred on October 7th, in the form of a videotaped interview between the defendant and Assistant District Attorney Gatto. It was a custodial setting and I viewed the videotape and listened to ADA Gatto administer the Miranda warnings.

The defendant acknowledged the warnings, understood them, and the Court finds, beyond a reasonable doubt, knowingly, intelligently, and voluntarily waived his Fifth and Sixth Amendment rights, that any statement

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1 that follows is admissible at trial.

2 The next person involved in the case
3 is defendant Devon Millington who was arrested
4 shortly thereafter, shortly after the
5 statements of Mr. Stallings, and that he was
6 involved in a custodial setting and questioning
7 conducted by Detective Bavolar who administered
8 Miranda warnings to Mr. Millington.

9 I find that the warnings were the
10 legally sufficient warnings, that the defendant
11 acknowledged receiving them, and knowingly,
12 intelligently, and voluntarily waived his Fifth
13 and Sixth Amendment rights beyond a reasonable
14 doubt.

15 The conversation and statement to
16 Detective Bavolar, as testified to by Detective
17 Bavolar that followed is, therefore, admissible
18 at trial.

19 Thereafter, a videotaped interview
20 was conducted between Devon Millington and
21 Assistant District Attorney Alloqua. This was
22 a custodial setting. Miranda warnings were
23 required and they were administered by ADA
24 Alloqua.

25 As the Court viewed on the videotape,

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1 they were proper in nature. The defendant
2 acknowledged the warnings themselves, and
3 knowingly and intelligently and voluntarily,
4 the Court finds, waived his Fifth and Sixth
5 Amendment rights. And that is established
6 beyond a reasonable doubt to the Court's
7 satisfaction, and the contents of the videotape
8 interview are therefore admissible at trial in
9 regard to Devon Millington.

10 So, in summary, the People have met
11 their burden of establishing, beyond a
12 reasonable doubt, the voluntariness of the
13 police statements offered in advance of trial.

14 People have satisfied, beyond a
15 reasonable doubt, that they are voluntary
16 statements, as required by the statute, and by
17 the case law.

18 As such, the motion to suppress any
19 and all such statements with regard to each
20 defendant must be denied, and each counsel for
21 each defendant has an exception to the Court's
22 ruling.

23 The foregoing constitutes the
24 decision and opinion and order of the Court. A
25 short form order will be prepared and placed in

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1 the indictment file as an additional record of
2 the Court's findings.

3 All right. Let's go on to
4 questioning and the question of severance.

5 You know, I've reviewed the
6 statements that were made, and it would seem to
7 me that what we have are what are commonly
8 referred to as interlocking statements by each
9 defendant.

10 Therefore, you know, certain options
11 are open and must be considered. They're
12 essentially options that the People have to
13 consider. One is severance, so that the
14 defendant being tried singularly would have a
15 statement that the People would seek to offer
16 in an unredacted form.

17 The other option is an attempt at
18 redaction, so that there is nothing in the
19 statement of one defendant to indicate or
20 suggest to a jury that he is making admissions
21 concerning a co-defendant.

22 There's a lot of case law on that,
23 and the use of pronouns, instead of names, or
24 just omitting certain words, et cetera. I
25 think the law is pretty clear that redaction

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1 has to be thorough and effective redaction, so
2 there is absolutely no suggestion or thought
3 that the statement of one defendant is somehow
4 implicating a co-defendant.

5 The last choice, I suppose,
6 hypothetically, at least for the People, is to
7 use no statements, and that would eliminate any
8 Bruton issue.

9 Have you given thought to the
10 situation?

11 MR. MCCARTHY: You left out choice
12 four, which was two juries, Judge.

13 THE COURT: Choice four is two
14 juries, which is a choice I seek not to
15 employ.

16 MR. MCCARTHY: Judge, I actually
17 have given a lot of thought to this matter, and
18 I think, frankly, you have a sense of what the
19 case is about, and it rests in large measure
20 upon the statements of each defendant, and I
21 don't see a meaningful way to redact those
22 statements in such a fashion that there could
23 be a joint trial where I was not really
24 diluting the power of my proof.

25 I've already indicated to Mr.

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1 iannuzzi and Mr. Smith that, in my opinion,
2 assuming this was to be the Court's ruling,
3 that I think there would have to be a severance
4 of the trials, and frankly, that's the option
5 that I think the interest of justice is best
6 served by.

7 So, I'm going to consent to the
8 severance motion based on the ruling that the
9 Court has made, in my judgement, about the
10 facts and circumstances, and how best to
11 proceed with the case.

12 THE COURT: Which case would you try
13 first?

14 MR. MCCARTHY: I've also indicated
15 to these gentlemen that I think the first trial
16 should be with respect to the defendant alleged
17 to be the shooter, which is Mr. Millington, and
18 that's the one I intend to proceed on.

19 THE COURT: Then that's how we'll
20 proceed. And Mr. Stallings's case will have to
21 be adjourned, but should follow Mr.
22 Millington's case, whatever the outcome of this
23 case. Because that will, I think, really be
24 the best way of maintaining the availability of
25 all witnesses.

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1 MR. SMITH: That was my question,
2 Judge. So, should I consider myself on trial?

3 The only reason I'm asking, I have
4 judges in Queens that want me, and I don't know
5 what to tell them.

6 THE COURT: Well, I don't know, I
7 haven't really received a witness list, yet. I
8 have some rough idea, in my own mind, how long
9 the trial might take, by my own evaluation of
10 what the People's case probably is with regard
11 to Mr. Millington.

12 And I think what I can do is, I can
13 help you by simply having you consider yourself
14 ready and passed.

15 MR. SMITH: That's fine with me,
16 Judge.

17 THE COURT: To follow up this
18 trial. But, I'll tell you, the problem is --
19 actually, it's not a problem.

20 How many witnesses do you
21 anticipate?

22 MR. McCARTHY: I think,
23 realistically, there's somewhere between eight
24 and ten. Most of them are relatively minor. I
25 think this is maybe three and-a-half to four

1 days worth of testimony, on my case, tops, and
2 then whatever Mr. Iannuzzi sees fit to do,
3 passed jury selection.

4 THE COURT: I would probably tell
5 the perspective jurors, in any case, that at
6 the outside, the case should be completed on or
7 before January 25th.

8 Now, starting Tuesday of next week,
9 that's twelve trial days, and I think that's
10 sufficient. And the case might be completed
11 earlier than that, but at the outside, I don't
12 think it should go longer than that.

13 Would that be a reasonable estimate,
14 do you think?

15 MR. IANNUZZI: I think so, sir.

16 MR. McCARTHY: Yes, I think that's a
17 generous one, and we should be finished within
18 that timeframe.

19 THE COURT: So, what I would do
20 then, I put Mr. Stallings case on for -- I'll
21 be working a different part starting the 28th,
22 so I'll simply have it called in Part 20 on the
23 28th.

24 The question is, would you be ready
25 to go right in to that?

c dr

Proceedings

1 MR. McCARTHY: Darrin any really
2 big complications with witnesses, I would think
3 it's simple enough to re-start the case, Judge.

4 THE COURT: Would it be better for
5 you, Mr. Smith, to take care of your other
6 commitments with a letter from me indicating
7 that you're expected to start on the 28th, of
8 January?

9 MR. SMITH: My commitment is
10 actually on the 25th. It's adjourned to the
11 25th. The case that was on trial today got
12 adjourned to the 25th.

13 MR. McCARTHY: Do you want to put it
14 on for the 22nd, and we can see where we're
15 at? It's the first day back after the holiday,
16 if that's good for Mr. Smith.

17 MR. SMITH: I'll ask for the 23rd.
18 I'll be in the Bronx on that day.

19 THE COURT: Sure. So you'll be
20 prepared, then, obviously, Mr. Smith, to make
21 other court commitments, other appearances
22 between now and the 23rd.

23 MR. SMITH: Yes, Judge, if there's a
24 problem, I'll contact you.

25 THE COURT: If you need a letter

c dr

Proceedings

1 from me saying you're expected to start on the
2 23rd, there's no problem getting you that
3 letter.

4 MR. SMITH: Thank you, Judge.

5 THE COURT: Okay.

6 MR. SMITH: Fine.

7 THE COURT: Even if you don't, it
8 will still protect you, to a certain extent.

9 MR. SMITH: I like the comfort of
10 the letter, Judge.

11 THE COURT: We'll prepare a letter
12 for you.

13 MR. MCCARTHY: I'd be happy to sign
14 it, too, if that means anything.

15 THE COURT: I think then what we
16 ought to just deal with are some preliminary
17 matters before trial.

18 And Mr. Stallings's case is adjourned
19 to January 23rd, and you can take his defendant
20 down.

21 MR. SMITH: Should I feel
22 comfortable in the fact that I will be provided
23 minutes of Mr. Millington's trial?

24 THE COURT: I approved you getting a
25 copy of the hearing.

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MR. SMITH. As well as Mr.

MR. SMITH: No, Judge?

THE COURT: On what basis would I

MR. SMITH: Thank you, Judge.

THE COURT: Right now the

THE COURT: Now, do you have a

MR. McCARTHY: I did it in a really

THE COURT: Mr. Iannuzzi, any names

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Proceedings

1 other than those names on the People's list
2 that you think might come up during trial, or
3 witnesses you might call? You don't even have
4 to tell me if it's a witness, just a name.

5 MR. IANNUZZI: The only thing that I
6 can think of, off the top of my head, is Mr.
7 Millington himself, perhaps. But I'm not sure
8 about that, so I don't know that we should even
9 mention that.

10 THE COURT: They'll know the name,
11 they'll hear the name of the defendant
12 mentioned. So, that's not going to be a
13 surprise.

14 MR. IANNUZZI: Whether they know him
15 or not, they will know that at the outset, so I
16 don't know that we have to mention him.

17 And I'm thinking of a medical expert
18 whose name I'm not quite sure of at the moment,
19 but I will have it for you before we begin the
20 picking of the jury.

21 THE COURT: Okay.

22 MR. IANNUZZI: The reason I don't
23 have his name is because I haven't spoken to
24 him.

25 THE COURT: That's all right.

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We're generally left with a group of prospective jurors who are then informed of the nature of the charges, and further voir dire is conducted by the Court with regard to the ability of those perspective jurors to evaluate

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Proceedings

1 and decide the case, according to the evidence
2 at trial, and the law provided by the Court,
3 excluding any possible prejudice or biases or
4 feelings of anger, revenge, or even sympathy.

5 My voir dire takes quite a bit of
6 time. So I think it's unlikely that you will
7 even voir dire the jurors until the afternoon.
8 Because it seems that invariably there are also
9 many jurors who reached the jury box who need
10 to approach the bench to discuss such things as
11 their prior victimization of a crime, or
12 relatives or friends or family members who have
13 been convicted of crimes.

14 And so, a lot of activity in that
15 regard will take place at the bench, out of the
16 hearing of the other jurors.

17 So what you have to discuss with your
18 client, Mr. Iannuzzi, is when the time comes
19 that jurors approach the bench to tell the
20 Court why that particular perspective juror
21 feels that he or she cannot be fair, for some
22 reason, if selected for this case, whether your
23 client wishes to be close enough to the bench
24 to hear what the juror has to say, and observe
25 the juror, or whether Mr. Millington will leave

c dr

Proceedings

1 the matter solely to you, content to remain at
2 counsel table, in the event you want to consult
3 with him in that regard.

4 But he wouldn't be able to be close
5 to the bench to hear or see the juror. If he
6 wants to exercise what we call his Antiomarchi
7 rights, I typically place him to my left, to
8 the side of the bench, which is about four feet
9 from the bench, and because he's incarcerated,
10 he would be flanked by whatever number of court
11 officers the sergeant determines is required.

12 So, you'd have to tell me if your
13 client wishes to exercise his Antiomarchi
14 rights or is he willing to waive them and
15 simply have you at the bench, with the DA, to
16 talk to any perspective juror who approaches
17 the bench with some problem about sitting on
18 the case, with the knowledge that if you wish,
19 you can leave the bench and discuss the
20 situation with your client and return to the
21 bench, as you see fit.

22 MR. IANNUZZI: You want me to make
23 that option now, Judge?

24 THE COURT: You can tell me Tuesday
25 morning.

c dr

Proceedings

1 MR. IANNUZZI. I understand
2 perfectly, in reference to that.

3 You know, the difficulty I have with
4 it, and I just make this objection for the
5 record, were the defendant not incarcerated, he
6 would be permitted to come forward and stand
7 there, and with the defendant incarcerated,
8 he's going to be standing there flanked by two
9 court officers, and we might as well put a flag
10 around him, or a sign around his neck, and the
11 whole purpose of what we're doing, we go out of
12 our way to make it seem he's not incarcerated
13 when he is incarcerated.

14 But the procedures, and I understand
15 the problems, but I don't appreciate, for the
16 defendant, being flanked by two court officers
17 while he's standing at the bench, because he'll
18 be followed by them, stood next to them, and it
19 becomes, therefore, obvious, and I don't think
20 that that alternative is fulfilling his rights,
21 because it deprives him, in another fashion, of
22 other rights.

23 And, as a result of that, I have to
24 consider it and I'd like to have the
25 opportunity to consider it over the weekend and

c dr

Proceedings

1 tell you Tuesday morning how we're going to
2 handle that.

3 THE COURT: Okay. Also, during my
4 voir dire, I do give the jurors a
5 questionnaire, and I'll give you a copy, each
6 side.

7 The questionnaire deals with -- off
8 the record.

9 (Whereupon, there was a discussion at
10 the bench, off the record.)

11 THE COURT: So the questionnaire is
12 not all I ask the jurors, but it's personal
13 information from the jurors, so you know
14 something about them personally, and each juror
15 is asked to respond to the questionnaire,
16 verbally.

17 Do you wish me to, during my voir
18 dire, Mr. Iannuzzi, instruct the jurors with
19 regard to the right of the defendant not to
20 testify at trial, and that if he does not
21 testify, no inference can be drawn against him
22 by the jury?

23 MR. IANNUZZI: Yes, sir.

24 THE COURT: I'll give that
25 instruction, and you can follow up to make sure

c dr

Proceedings

1 that jurors understand the instruction, but
2 you're directed not to embellish the
3 instruction by offering reasons to the jury why
4 he might or might not testify. It's simply a
5 rule that applies if he does not, but there
6 cannot be explanations offered, one way or the
7 other, as to why he might or might not.

8 Is there any need for a Sandoval
9 hearing in this case, any prior bad acts,
10 People, acts of moral turpitude, crimes or
11 other impeachment material?

12 MR. MCCARTHY: No, your Honor.

13 THE COURT: There's no need for a
14 Sandoval hearing.

15 Sequestration is not involved.

16 One other base I touched, typically,
17 is disposition, just so we know that the base
18 was touched.

19 Is there any disposition that would
20 satisfy both the People and the defense with
21 regard to the outcome of this case, rather than
22 a trial?

23 MR. IANNUZZI: Well, there's one
24 that would satisfy the People and one that
25 would satisfy the defendant.

c dr

Proceedings

1 THE COURT: That's why I say and,
2 not or. It has to be both.

3 MR. McCARTHY: We've actually been
4 discussing that, Judge. We sort of know where
5 the bottom line is and we're not there, so I
6 guess the answer is no.

7 MR. IANNUZZI: I'm sure over the
8 weekend Mr. McCarthy will reconsider it and
9 we'll discuss it with your Honor on Tuesday
10 morning.

11 THE COURT: You may, if you wish.
12 Right now I'll note there's none satisfactory
13 to both.

14 The only thing I can tell you about
15 voir dire, I put sixteen in the box and the way
16 it's done, there will be two seats at the far
17 right of the box, two extra chairs, so there
18 will be sixteen in the box.

19 We load and unload the box from the
20 audience so there are no jurors in the well, I
21 don't like them wandering around here, it's too
22 small a courtroom.

23 Seat number one, first seat, first
24 row, and then you'll end up with sixteen and
25 we'll voir dire, hopefully, sixteen at a time.

c dr

Proceedings

1 Just generally, if you have any
2 questions about the voir dire and the scope of
3 your voir dire, you know, you can look at the
4 statute, 270, to see what it permits.

5 And just know that I don't allow
6 scenarios presented to the jury, I don't allow
7 hypothetical questions submitted to the jury,
8 don't try your case in hypothetical questions
9 or scenarios to the jury.

10 The purpose of the voir dire is to
11 make inquiry of the individual jurors to
12 determine his or her impartiality and ability
13 to be fair and impartial and objective.

14 So, questions that go outside that
15 will not be permitted. There should be, people
16 should be referred to -- when I say people, I
17 mean witnesses or the defendant himself by full
18 name rather than first names.

19 So Mr. Millington is not to be
20 referred to as Devon. He's to be referred to
21 as the defendant, or Devon Millington, or Mr.
22 Millington. Or, in your case, Mr. Iannuzzi,
23 your client.

24 (Continued on the following page...)

25 24 c dr

Proceedings

1 THE COURT: But not by first name
2 only. That would apply to all witnesses who
3 are referred to.

4 I rely on your expertise and
5 experience to -- for any further limits on what
6 is a proper voir dire and what is not.

7 And if you have any questions about
8 matters that you typically like to ask about
9 and think that might create an issue, you know,
10 tell me about it. I've had all sorts of things
11 asked in this courtroom that I don't permit.
12 I've had D.A.'s who tell the jurors that they
13 once were defense attorneys. I've had the
14 opposite with defense attorneys telling jurors
15 that they were once D.A.'s. I don't permit
16 that.

17 I don't permit reference to former
18 Army or Navy or Air Force or Marine involvement
19 if it applies to you.

20 If a juror, for instance, says I work
21 for AT&T, it's improper for anyone to say I
22 used to work for AT&T, any litigant to say I
23 used to work for AT&T and show ground or
24 anything like that.

25 There can't be any attempts to

Proceedings

1 achieve some degree of personal familiarity of
2 jurors or to suggest any such familiarity.

3 Don't suggest anything about a hung
4 jury. Don't ask jurors if it's 11 to one and
5 you're the one, will you stick to your guns. I
6 don't permit that. But you can ask jurors, for
7 example, if they're prepared to make up their
8 own mind, even if their thoughts may be
9 different from those of another juror. Are
10 they prepared to discuss such thoughts with
11 their fellow jurors and listen to what their
12 fellow jurors have to say, but no suggestion of
13 jurors being in a mistrial situation.

14 Just to give you an example of
15 what's -- what happened in the past: Neither
16 side should attempt to tear up the indictment
17 in front of the jury or a copy of it in an
18 attempt to demonstrate that the indictment is
19 not evidence or important in any way. That
20 happened once. So general rule is no
21 demonstration during voir dieres of any kind.

22 Any questions about voir dire?
23 Anything else right now?

24 MR. MC CARTHY: Is it okay for me to
25 be funny, Judge?

Proceedings

1 THE COURT: Generally -- you mean
2 intentionally?

3 MR. IANNUZZI: Don't worry about
4 that, Judge.

5 THE COURT: Use good judgment, that's
6 all I can say.

7 MR. IANNUZZI: Judge, in reference to
8 having the 16 in the box, do you then go
9 through the entire panel or as you're going
10 along if there is somebody who should be
11 excused, do you fill the box up again?

12 THE COURT: Typically what I'll do,
13 I'll excuse people on my own initiative if I
14 feel a juror has expressed an inability to meet
15 the statutory requirement of an impartial
16 juror. And if I use people and seats become
17 empty in the box, I'll refill the seats, yes.
18 I try to keep 16 in the box by the time the
19 People and defense have to voir dire.

20 MR. IANNUZZI: And then in making
21 determinations of -- or exercising
22 peremptories, once you exercise the peremptory
23 in reference to say a particular box, are those
24 people immuned from peremptory subsequently?

25 THE COURT: Yes. The ones that are

Proceedings

1 left, yes. Yes, but typically they'll be sworn
2 and excused.

3 MR. IANNUZZI: How many peremptories
4 am I --

5 THE COURT: 20.

6 MR. IANNUZZI: 20.

7 THE COURT: But as I often say to
8 both sides, the juror of your dreams is not
9 just around the corner. And if -- even if the
10 juror were around the corner, you can be sure
11 the other side would probably --

12 MR. IANNUZZI: Get rid of him.

13 THE COURT: Exercise something. So
14 try to use your best judgment in jury selection
15 with whatever panel we were sent, because it
16 will be, I assure you, a cross section of the
17 Bronx community.

18 When jurors approach the bench, by
19 the way, what I typically do is I'll hear what
20 the juror has to say, I'll ask any questions
21 that I have and then I'll ask the People if
22 they have any questions and I'll ask the
23 defense if you have any questions of the
24 juror.

25 You should not express an opinion one

Proceedings

1 way or the other in the presence of the juror
2 as to whether you wish to retain the juror,
3 excuse the juror. I will send the juror back
4 to the audience if it's that stage of the
5 proceedings, and at that time I'll make inquiry
6 of you whether you consent or don't consent to
7 excuse the juror. Or on occasion I'll simply
8 excuse the juror on my own initiative and the
9 same with jurors who might come from the jury
10 box to the bench.

11 No juror should hear one side or the
12 other express favor or disfavor toward that
13 particular person. The jury, you know, I think
14 then is protected and you're protected from any
15 personal feelings one way or the other.

16 Okay. Anything else? If you have
17 any questions, you can broach them Tuesday
18 morning while we're waiting for the panel to
19 get here. And before you ever exercise
20 challenges I'll go over the challenging
21 procedure; okay. So, hopefully,
22 optimistically, if we have a jury by the end of
23 the day Wednesday, I'll be quite happy. If we
24 have a jury after that, fine. I just think --
25 I tell the jurors everyone is pledged to work

Proceedings

1 as expeditiously as possible to complete the
2 trial, that's what they expect.

3 MR. IANNUZZI: One further thing.
4 When the jurors are excused, are they excused
5 en masse without an indication by whom, by
6 which side?

7 THE COURT: Yes.

8 MR. IANNUZZI: Just said "excused".

9 THE COURT: The jurors would not know
10 who challenged the juror unless they sense it
11 from me when I excuse them. What I do is
12 typically I just direct them to, you know, what
13 they learn when they got their jury coaching
14 downstairs -- not jury coaching, but what do
15 they call it --

16 MR. MC CARTHY: Indoctrination.

17 THE COURT: Right, when they receive
18 their indoctrination, they're given an
19 explanation how jurors are excused or
20 challenged. That's the information they carry
21 with them. They wouldn't know which side it is
22 when they're excused.

23 Also if there are any spectators at
24 the trial, either people associated with the
25 deceased or with the defendant, the rule is

Proceedings

1 that they're not to -- of course, and they must
2 be instructed by each side, by the attorneys
3 for each side -- they're not to even attempt to
4 make any contact with any jurors, to talk to
5 any jurors or even to speak loudly enough in
6 the presence of jurors, either in the street or
7 in the building so that a juror could hear what
8 is said, because I give the jurors very careful
9 instructions about reporting any such incidents
10 to the Court, so it's better to start out with
11 spectators knowing that.

12 And when the jury is excused, for
13 example, for lunch, during the trial, all
14 spectators must wait in the courtroom at least
15 two or three minutes before they leave the
16 courtroom so that they minimize chances of
17 interaction with any jurors.

18 Okay. Anything else right now?

19 MR. IANNUZZI: No, sir.

20 MR. MC CARTHY: No, sir.

21 THE COURT: Have a good weekend
22 everyone and we'll start Tuesday morning. If
23 you're here promptly by ten that would be fine.

24 MR. IANNUZZI: Thank you, sir.

25 MR. MC CARTHY: Thank you, Judge.

Proceedings

* * * *

Certified to be a true and accurate
transcript of the stenographic minutes taken
within.

Susan McPartland

Susan McPartland
Senior Court Reporter

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Millington-Defense-Cross

970

1 Q. Okay, what else would be required for you to
2 shoot a bartender?

3 A. Nothing, because I don't believe I would
4 shoot a bartender.

5 Q. How sure are you that you were at NYU and
6 then bought PCP the day of the homicide?

7 A. I was a hundred percent sure.

8 Q. Did you work all five days that week?

9 A. Did I work? When are you talking about July
10 20th?

11 Q. The week of July 20th, I guess, Thursday
12 morning?

13 A. No. I think I took off the next day.

14 Q. After the murder?

15 A. Yeah.

16 Q. And what about that, like that Monday and
17 Tuesday, did you work those days?

18 A. Yeah. I worked regularly after that. Yes.

19 Q. Now, are you just assuming that or do you
20 really actually remember this?

21 A. Actually, to my recollection I think I
22 worked. Of course I worked.

23 Q. You said that you would go to ----

24 What's the name of the company that you work for?

25 A. Remco.

Millington-Defense-Cross

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1 Q. You would go to Remco and then they would
2 send you out to where you were going?

3 MR. IANNUZZI: Objection, Judge, already
4 asked and answered.

5 A. What was that?

6 Q. You would go to Remco, they would assign you
7 out to where you were going and then you would go to
8 wherever the job site was with your foreman?

9 A. Yes.

10 Q. And when they would assign you out everyday
11 of the week they would fill out a sheet, a work order
12 with who was going where, correct?

13 A. Correct.

14 Q. And they would put the foreman and the
15 helper, and the initials of the people assigned to
16 those jobs, correct?

17 A. Correct.

18 Q. And then that same sheet would let you know
19 whether you took a vacation day or something like that,
20 correct?

21 A. I wouldn't know.

22 Q. You do know about the job assignment part of
23 it, right?

24 A. Yeah.

25 Q. Okay. So if I showed you those sheets from

Millington-Defense-Cross

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1 that week would it help you refresh your recollection
2 as to what days you worked and didn't work?

3 MR. IANNUZZI: Objection, Judge, this is
4 irrelevant at this point.

5 THE COURT: Overruled.

6 MR. MCCARTHY: Judge, I have five days
7 I would ask that we mark them People's 25 for
8 identification.

9 MR. IANNUZZI: May I see what the
10 district attorney has?

11 THE COURT: First it will be marked,
12 just mark it People's 26A, B, C, D and E for
13 identification.

14 And then after it is marked show it to
15 defense counsel.

16 (Whereupon, the documents are received
17 and marked as People's Exhibits 26A, 26B, 26C,
18 26D, and 26E for identification.)

19 THE COURT: The exhibit is handed to
20 counsel.

21 (Whereupon, the exhibit is handed to Mr.
22 Iannuzzi.)

23 MR. IANNUZZI: May I have a moment with
24 the assistant?

25 THE COURT: Yes.

Millington-Defense-Cross

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1 (Short pause.)

2 THE COURT: The Exhibit has been marked
3 for identification and has been shown to defense
4 counsel.

5 MR. MCCARTHY: Could we show that to the
6 defendant.

7 (Whereupon, the exhibit is handed to the
8 witness.)

9 THE COURT: Document is handed to the
10 witness.

11 A. What does this prove?

12 MR. MCCARTHY: I have some questions,
13 Judge.

14 THE COURT: You may continue.

15 Q. All right. Now, Mr. Millington, you said
16 before that when you get assigned out to a job--

17 A. Uh huh.

18 Q. --people fill in like the work address
19 and who goes where, right?

20 A. Yes.

21 Q. And those five pages that are marked
22 for identification are work records from Remco for
23 the week of July 17th through the 21st, aren't
24 they?

25 A. Where does it indicate that?

Millington-Defense-Cross

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1 Q. I didn't hear you?

2 A. Where does it indicate that?

3 Q. I'm asking you if you know from looking at
4 them, because you have been working there five and a
5 half years, correct?

6 A. I don't handle none of the paperwork.

7 Q. That would be handled by who?

8 A. That would be handled by probably the
9 foreman.

10 Q. Or maybe a man name Mr. Kenny, right?

11 A. Yes.

12 Q. Who is Mr. Kenny?

13 A. Mr. Kenny is the manager of Remco.

14 Q. And he keeps copies of those records,
15 right?

16 A. Yeah.

17 Q. Correct?

18 A. Correct.

19 Q. Well, for instance, would it refresh your
20 recollection looking at those records that on Monday,
21 July 17th, you didn't go to work at all; does that
22 refresh your recollection?

23 A. I don't know if I went to work on that
24 day. Didn't I just tell you that?

25 Q. I'm asking you if you could look at the

Millington-Defense-Cross

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1 record and tell us if that refreshes your recollection
2 as to whether you went to work?

3 A. I don't know if I went to work or not.

4 Q. Well, did you call in sick maybe?

5 A. Maybe.

6 Q. How about Tuesday, did you go to work on
7 Tuesday?

8 A. I don't know.

9 THE COURT: That would be July 18th you
10 are talking about?

11 MR. MCCARTHY: That would be the 18th,
12 yes.

13 THE COURT: Okay.

14 A. Most likely. I don't know.

15 MR. IANNUZZI: Your Honor, would you ask
16 the witness to speak loudly so that the jury can
17 hear him.

18 THE COURT: Keep your voice up.

19 Did you get the answer?

20 (Whereupon, the answer is read back.)

21 Q. Well, you are on vacation, you took a
22 vacation day on the 18th, correct?

23 A. I have, I got a lot of vacation days.

24 Q. I'm asking you if you took a vacation day on
25 the 18th?

Millington-Defense-Cross

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1 A. How am I suppose to remember?

2 MR. IANNUZZI: Your Honor, it is not
3 necessary for either the district attorney or the
4 witness to yell at each other.

5 THE COURT: I don't know if I call it
6 yelling.

7 MR. IANNUZZI: Loud.

8 THE COURT: But the question was
9 asked and an answer was given.

10 We will continue.

11 Q. You didn't work at NYU on the 19th, did you?

12 A. Yes, I did. I worked at NYU around the
13 section, I am telling you NYU because everyone knows
14 NYU.

15 Q. Right. But that's not where you worked on
16 the 19th; you worked at 1 Hanson Place in Brooklyn, New
17 York?

18 A. I did not work at Brooklyn, New York.

19 Q. Flatbush Avenue Extension?

20 A. No, I did not.

21 Q. HSBC Bank?

22 A. No, I did not.

23 Q. You know that big building down town
24 Brooklyn?

25 A. I did not work there.

Millington-Defense-Cross

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1 Q. You never worked there before?

2 A. I worked there before.

3 Q. So you know the one I'm talking about?

4 A. I know the one you are talking about.

5 Q. So, now on the next day, the 20th, are you
6 as sure that you didn't work at HSBC on the 19th as
7 you are that you didn't shoot the bartender?

8 A. I didn't work there.

9 Q. You said the 20th you stayed home?

10 A. The 20th I stayed home.

11 Q. Is that right?

12 A. It's a possibility. I could have stayed
13 home.

14 Q. Well, are you changing your mind now?

15 A. I never gave you a sure answer.

16 Q. I guess we can all agree on that.

17 MR. IANNUZZI: Objection to the
18 colloquy, and ask it be stricken.

19 THE COURT: Sustained.

20 The jury will disregard that extra comment by
21 the district attorney.

22 MR. MCCARTHY: I ask you to direct the
23 witness to answer questions put to him and not
24 interject comments.

25 THE COURT: No one is to interject

Millington-Defense-Cross

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1 comments.

2 Q. You went back to work on the 20th, didn't
3 you?

4 A. May have. Yes.

5 Q. Back at HSBC, 1 Hanson Place, Brooklyn, New
6 York?

7 A. Maybe.

8 Q. Isn't that true?

9 A. Maybe. Maybe I worked there. I'm a floater,
10 I go anywhere.

11 Q. Well, now, you might have worked in Brooklyn
12 on Thursday but you definitely didn't work in Brooklyn
13 on Wednesday?

14 A. I don't know. You are telling me to
15 recollect from where I went from that time; and I told
16 you and that's that.

17 Q. You don't seem to have any trouble telling me
18 not to put words in your mouth, do you?

19 A. You're putting word in my mouth now.

20 MR. IANNUZZI: Objection, Judge, that
21 was not said by the witness.

22 THE COURT: He's being asked the
23 question.

24 Question is: Do you have trouble telling
25 people not to put words in your mouth?

Millington-Defense-Cross

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1 THE WITNESS: What was that?

2 THE COURT: You can have it read back
3 or you can repeat it again, counsel.

4 Q. You don't have any trouble telling me not to
5 put words in your mouth, do you?

6 A. What was that?

7 Q. Did you work at NYU on Wednesday or do you
8 not remember?

9 A. I remember being in the section of NYU.

10 Q. You don't know where you were on Thursday, do
11 you?

12 A. This paper doesn't mean nothing. Because
13 any person, any helper or apprentice can be switched
14 off.

15 Q. But your initials are DM, aren't they?

16 A. Yes, they are.

17 Q. Are you saying now that you recognize what
18 that paper is?

19 A. I don't handle these papers.

20 Q. Have you ever seen one before?

21 A. I've seen a work order sheet before but I
22 never seen it like this.

23 Q. Do you have the statement up there?

24 A. Yes.

25 THE COURT: Yes, the exhibit is there.

Millington-Defense-Cross

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(Statement handed to Mr. McCarthy.)

MR. MCCARTHY: I'm going to display
People's 23 to the jury, Judge.

Q. Just take a look behind you, do you see that?
Is that your signature?

A. Yes, it is.

Q. You remember a couple of weeks ago in this
courtroom you said that you didn't think that was your
signature?

A. I said it is not like mine because you can
tell I was nervous. It is my signature.

Q. A couple of weeks ago didn't you tell Judge
Straus at a hearing here that didn't look like your
signature?

MR. IANNUZZI: Objection, Your Honor,
this is inappropriate use of alleged prior
inconsistent statement if there be such.

THE COURT: Well, you can make the
inquiry but if it's reflected in a specific
question followed by a particular answer
that's the way it has to be. That's the way
the reference has to be made as oppose to a
summary.

MR. MCCARTHY: I just wanted to ask
the general question and then go to the specifics.

Millington-Defense-Cross

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1 I will follow up in a minute.

2 Q. Are you saying now that's your signature?

3 A. That's my signature. Yes, it is.

4 Q. Now this statement here, and I'm holding up
5 People's 24?

6 A. Yes, sir.

7 Q. This is all what Bavolar told you and wrote
8 down for you, correct?

9 A. No, that's partly what Garcia told me and
10 Bavolar told me. And Bavolar was writing it out and
11 parts he was telling me to do this, and you know.

12 Q. The question is, none of this came from you;
13 is that your testimony?

14 A. Probably the angle dust part. And he wanted
15 me to say that I shot him so I guess I said it; I
16 popped him.

17 Q. So you did say that you popped him?

18 A. Yes. In cooperation, not cooperation, but
19 just being told what to say. And he said he will
20 help me.

21 Q. Remember yesterday when we played that video
22 statement in the courtroom of you talking to the
23 assistant district attorney?

24 A. Yes, sir.

25 Q. That was you, right?

Millington-Defense-Cross

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1 A. Yes, sir.

2 Q. And that was you reading through this
3 statement on TV, right?

4 A. No, I wasn't reading it on TV. I was
5 reading. It was read to me quite a few times. I have
6 an understanding of it and that's what was told to me
7 to be said.

8 Q. So it got read to you a couple of times and
9 you were able to like memorize it?

10 A. Well, after Garcia comes in and tells me and
11 after he comes in and tells me, what am I suppose to
12 do?

13 Q. Okay, let's go back to that signature for a
14 minute. And reading from page two-0-five of the
15 transcript, page two-0-five line 16.

16 "QUESTION: How about the signature where
17 it says Devon Middleton?.

18 ANSWER: I really don't write like this
19 honestly. I really don't write like this but I
20 mean it's almost similar.

21 QUESTION: It is similar to your
22 signature?

23 ANSWER: Almost. Almost".

24 Remember being asked those questions and giving
25 those answers?

Millington-Defense-Cross

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1 A. That's my signature.

2 MR. IANNUZZI: Objection, Your Honor.

3 This is not inconsistent.

4 THE COURT: Overruled.

5 Once again the jury makes a
6 determination on an earlier statement as oppose to
7 trial testimony. You decide if there's a
8 difference. If that difference seems significant
9 to you, if the difference is significant you may
10 consider that difference as a factor in accessing
11 the credibility of the witness. That's the use
12 that may be made of what is commonly referred to
13 as a prior inconsistent statement. But you, the
14 jury, decide the facts of that matter.

15 Q. Now, I'm putting up a portion of People's 24,
16 and at the top it says "Devon S. Millington", you see
17 that?

18 A. Yes.

19 Q. And that's what Bavolar wrote down,
20 correct?

21 A. Yes.

22 Q. Because it's his handwriting?

23 A. Yes.

24 Q. What is your middle name?

25 A. Stewart.

Millington-Defense-Cross

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1 Q. So, did Bavolar tell you your middle initial
2 was "S" or you told him?

3 A. No, it's on my driver's license.

4 Q. How about your address, {1334} Bussing
5 Avenue?

6 A. That's on my driver's license also.

7 Q. Did you tell him that's where you lived?

8 A. You can actually go there and look at it.

9 Q. I'm asking you if you told him that that was
10 your name, address and phone number?

11 A. I don't know. How am I suppose to remember
12 every single last detail?

13 Q. You said you were able to remember every
14 single detail to recite it on the video.

15 A. That thing was read to me and that thing is
16 not, it's not the same as the statement; you know
17 that?

18 Q. Your phone number is not on your driver's
19 license?

20 A. Of course, I know my phone number.

21 Q. I'm saying Bavolar didn't know your phone
22 number, did he?

23 A. Of course, they called my house.

24 Q. How did he get your phone number?

25 A. They called my house and told me I was

Millington-Defense-Cross

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1 incarcerated, I was arrested.

2 Q. What are you talking about?

3 A. What are you talking about?

4 THE COURT: Sustained as to form.

5 You have to ask a different question.

6 Q. How did Bavolar get your phone number?

7 A. I told him my phone number and he wrote it
8 down of course.

9 Q. So that's part of the information you told
10 Bavolar?

11 A. Yes, of course why not.

12 Q. Now, the first thing that Bavolar wrote here
13 is that you said, "I already had smoked angle dust
14 before I got there"?

15 A. Yes, sir.

16 MR. IANNUZZI: Your Honor, the
17 document which is in evidence always speaks for
18 itself. If the district attorney wants to ask
19 questions about the underlying factors that lead
20 up to the making of that, but not to read it to
21 the witness and ask him about it is improper. It
22 speaks for itself.

23 THE COURT: It speaks for itself.

24 It does speak for itself in terms of its
25 contents but its contents may be inquired about

Millington-Defense-Cross

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1 as proper cross-examination. So the objection
2 must be overruled.

3 Q. How did Bavolar know that you had smoked
4 angle dust?

5 A. Because I was telling him constantly.

6 Q. So, that's something that you told Bavolar
7 and he wrote down, correct?

8 A. That could be one of the things.

9 Q. Well, that is the one I'm asking you about
10 now.

11 A. Angel dust, yes.

12 Q. He didn't tell you: Listen, say you smoked
13 angle dust, correct?

14 A. No.

15 Q. You told him I smoked angel dust?

16 A. Yes.

17 Q. And he wrote it down the first thing,
18 correct?

19 A. (Affirmative nod.)

20 Q. You have to answer?

21 A. Yeah.

22 Q. And then you said, "My friends Ray, his
23 brother Mike and Tony were already there, I had
24 alcoholic drinks and did cocaine", correct?

25 A. Right.

Millington-Defense-Cross

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1 Q. Now, did you tell Bavolar that or did he tell
2 you?

3 A. He told me the whole setting of everything,
4 but I knew that they was there. Yes.

5 Q. How did he know you were doing cocaine and
6 drinking?

7 A. I told him I was sniffing cocaine, I was
8 high on angel dust and I was drinking. And that's all
9 I explained to Bavolar for about a half hour, so of
10 course why wouldn't he write that down.

11 Q. Well, then he did write it down, right?

12 A. Yes, he wrote that down.

13 Q. So what you are saying is some of the stuff
14 he wrote down, in fact, you had told him, true?

15 A. Some of the facts, true. Yeah.

16 Q. And what he wrote down about the angle dust
17 and the alcohol and the cocaine, that kind of helps you
18 out, right?

19 A. He said I will help you out if you help me
20 out.

21 Q. One of the things you told him too is, "I was
22 numbed up and I was scared to death"; remember telling
23 him that?

24 A. No.

25 Q. You know when you were talking about using

of f Proceedings

1 based on the papers that they've sent forward. And
2 a copy is provided defense counsel.

3 MR. IANNUZZI: Do you want me to be
4 heard on that, Judge?

5 THE COURT: Well, I'll hear you. See, I
6 already issued the subpoena.

7 MR. IANNUZZI: I know.

8 THE COURT: So, the question is and the
9 case that they attach, which is a First Department
10 case, is a case where a judge in Manhattan issued a
11 subpoena, denied the Police Department motion to
12 quash. The case went up. Police Department took
13 it up. The Appellate Division reversed the trial
14 judge and quashed the subpoena, pretty much on the
15 grounds that I mentioned, and under the Litto case,
16 in that there was insufficient factual basis to
17 issue the subpoena. So, I suppose what they're
18 saying to me, the Police Department is, yes, you
19 issued the subpoena but why and what for? Why does
20 the counsel need the Police Department regulations
21 concerning whether detectives have to keep memo
22 books. That just seems to be a fishing expedition.
23 And what does it have to do with the guilt or
24 non-guilt of the defendant or any other material
25 issue at trial?

of f

Proceedings

1 Your argument would probably be that at
2 the hearing, the detectives testified that they
3 didn't have their memo books. They hadn't been
4 able to locate them and they weren't quite sure,
5 they didn't think they had to keep memo books, as
6 detectives, that it really wasn't necessary to do
7 it. I wasn't sure -- I'm not sure of their exact
8 testimony in that regard.

9 So, basically, you want it for
10 impeachment purposes, if they testify at trial, I
11 would imagine.

12 So, the question is should the subpoena,
13 based on the law and memorandum submitted by the
14 Police Department, should I insist on compliance by
15 the Police Department or should I take, you know,
16 accept the Memorandum of Law and the cases they
17 pass on in their argument as being a proper
18 approach and decide to -- that the subpoena was
19 improvidently issued. I guess that's really what
20 the issue is.

21 MR. IANNUZZI: Well, it's amazing that I
22 thought I was in the Supreme Court and I thought
23 that you were a Justice of the Supreme Court and
24 that when you gave an order to the Police
25 Department, that they had to comply and that you're

pf f

Proceedings

1 not here with a knee jerk reaction to defense
2 counsel, just signing anything willy-nilly, but I
3 guess they don't think that.

4 THE COURT: No, no, they have a right to
5 move to quash, as the case that they submitted,
6 where a Supreme Court justice in Manhattan issued a
7 subpoena. The Police Department moved to quash,
8 just as they're doing here. That court denied the
9 motion to quash and on appeal of that decision, of
10 that denial, the Appellate Division First
11 Department, it's towards the end of their papers,
12 explained why the motion to quash was granted
13 should have been granted, and overruled the Supreme
14 Court.

15 MR. IANNUZZI: I have read this.

16 THE COURT: And I'm a -- you know, I'm
17 bound to follow the reasoning and holdings of the
18 First Department, as you know. And sometimes
19 subpoenas are issued and then there's a motion to
20 quash. Sometimes the defense moves to quash the
21 People's subpoena and the Court has to consider the
22 arguments made and decide whether or not the
23 subpoena was issued improperly or without due
24 justification.

25 MR. IANNUZZI: Well, Judge, but you, I'm

of f

Proceedings

1 sure, recognize the distinction between the -- I
2 guess this is the Litto case. I'm not sure, Bagley
3 case.

4 You recognize the distinction in the
5 Bagley case. The Appellate Division affirmed or
6 actually quashed and overruled the quashing. No,
7 overruled the failure of the trial part to quash
8 and quashed and granted the motion, because they
9 said the court erroneously denied the Police
10 Department's motion to quash, since the defendant
11 failed to put forth a factual predicate.

12 But I have put forth a factual predicate
13 that -- which I didn't put it in the subpoena,
14 where it's not intended, because I didn't make a
15 motion for the subpoena. I handed you the
16 subpoena. You questioned it and struck out half or
17 three quarters of the subpoena and took evidence in
18 reference to or at least took a proffer in
19 connection with it, got the basic underlying
20 predicate to support the contention that the
21 document sought bears relevant and exculpatory
22 evidence and made a determination, as a sitting
23 justice, that the Police Department and Mr. Bagley,
24 or Mr. Bogan, Jeffrey Bogan, who is an attorney,
25 decided that you didn't exercise your discretion

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Proceedings

1 properly is nonsense, because this is not the same,
2 we are not in pari delicto with the Bagley case,
3 because we do have a predicate and your Honor
4 reviewed it. That you have to explain to the
5 Police Department on a subpoena why you did that,
6 or if, at this point, to explain to the -- to
7 Mr. Bogan, that, in fact, you took the factual
8 predicate and it's on the record, perhaps the
9 Police Department would be so kind as to relent
10 from the position that they take defying your
11 Honor's so order.

12 I know that they're entitled to do that,
13 but now that we have found out that they're wrong,
14 perhaps we can go forward and if you will, I will
15 put in an answering paper saying that you have the
16 factual predicate, but I don't think that should be
17 necessary, because here we are on trial and what
18 they have done and what they intend to do and what
19 they want to do is continue the trial by ambush
20 that has been permitted so often and that Copicotto
21 from the Court of Appeals said, a trial shouldn't
22 be -- and you know, Judge, if I had just come in
23 and sandbagged you, that's one thing. You had a
24 discussion about this. You eviscerated my
25 subpoena. You -- I went along with it over

of f

Proceedings

1 objection. And you made a decision and now they
2 want to eviscerate it further, saying you didn't
3 know what you were doing.

4 THE COURT: Well, someone could probably
5 trot down there to police headquarters and see if
6 there's a patrol guide or detective regulation
7 guide that covers the subject and that would
8 probably be it.

9 MR. IANNUZZI: Who would show it to us?

10 THE COURT: In my own mind, I'll study
11 the papers and study the issue. I issued the
12 subpoena for that little bit of rules and
13 regulations, not with the idea that -- not
14 necessarily that they could be used at trial, but I
15 thought it had some relevancy to your questioning
16 during the pretrial hearings. So that's why I
17 narrowed the subpoena to that.

18 But I guess, I guess the question is,
19 for me, is, you know, what do I -- do I adhere to
20 their arguments or not? So I'll study their papers
21 and give a decision. I don't know if they're
22 saying that you should have proceeded otherwise
23 under C.P.L.R. and move for the subpoena on Notice
24 of Motion, so that the district attorney could
25 oppose or not oppose the issuance of it and offer

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1 reasons.

2 Therefore, I'll have to look at it more
3 closely, to see if that's the reason that they're
4 attacking it in whole or in part.

5 MR. IANNUZZI: By the way, Judge, just
6 as an aside, which isn't really an aside, the
7 district attorney was here to oppose or not oppose.
8 They don't know that perhaps, they, meaning the
9 Police Department don't know that, but the district
10 attorney, two district attorneys eminent district
11 attorneys and counsel were here when we went
12 through this entire thing. Maybe there's a way
13 that you have to put on a subpoena all of the steps
14 that were taken, but I don't think so.

15 And I'd just like to note for the
16 record, which is very interesting, the district
17 attorney's suggestion that I can't have discovery
18 of the files and everything and suddenly the Police
19 Department, in this position, takes a position that
20 I took, that the Police Department is not an arm of
21 the District Attorney's Office but they are an
22 investigative office and if we don't have, we the
23 public and attorneys, don't have access to their
24 investigative reports, then they disappear and
25 nobody has them, because you can't have a private

of f Proceedings

1 investigator with the Crime Scene Unit
2 investigating, so that they basically are quasi
3 public and they agree with that. They say we're
4 not an arm of the district attorney. We're a
5 private party.

6 Well, if they're a private party, no
7 private party has a right to maintain an
8 independent position and obstruct the functioning
9 of this Court.

10 THE COURT: Okay. I'll take their
11 papers under advisement.

12 MR. IANNUZZI: Yes, sir.

13 THE COURT: Okay. Now, tomorrow, we
14 should have a full day. The time factor is
15 disturbing to me. I wanted to start -- I want the
16 attorneys in court by ten and you didn't -- you
17 weren't here, Mr. Iannuzzi, until after that. It
18 may have been traffic. I don't know what.

19 But I don't want the jury to be told to
20 be here by 9:45 and then I don't bring them up to
21 the courtroom until much later and they just decide
22 that, you know, that we're just dragging time. So
23 I want everyone here to start by 10 o'clock.

24 MR. IANNUZZI: Yes, sir.

25 THE COURT: If you're not here by 10

pf f

Proceedings

1 o'clock, I'm going to ask for a reason. If the
2 reason is unsatisfactory, either side is subject to
3 sanction or I'm going to tell the jury who was late
4 and why we're starting late.

5 So, I don't want this jury to sit around
6 thinking that everyone is wasting their time. So
7 it's important to be here. If you get held up, I
8 know things happen, you know there can be traffic
9 problems, there can be other problems, if something
10 happens to delay you and you didn't leave in time,
11 enough in time to get here on time, then call the
12 court.

13 But I can't say 10 o'clock and then have
14 people walking in at ten-fifteen or ten-twenty and
15 just leave it at that. All right.

16 So, I'll keep it at ten, as long as you
17 are going to be here by ten. If you're not here by
18 ten, People and defense, I'm going to make it 9:45
19 and if you're not here by 9:45, without a
20 reasonable explanation, I'm going to sanction you,
21 pursuant to Rules of the Chief Administrator of the
22 Court, Part 130. I've done it before; I'll do it
23 again.

24 I don't like to do it, but I will,
25 because I do not want -- it's not fair to the jury

M. Suarez/People/Direct (McCarthy)

1 A. Yes.

2 Q. And after that, did you speak to a female
3 assistant district attorney on videotape and give an
4 interview there as well?

5 A. Yes.

6 Q. And did you tell her what you've told the
7 jury now?

8 A. Yes.

9 Q. Where have you been since October 6th?

10 A. Incarcerated.

11 MR. MCCARTHY: I don't have any other
12 questions of this witness, your Honor.

13 THE COURT: Okay, it's almost five
14 o'clock, so we're going to break for the day.

15 Members of the jury, we'll resume
16 tomorrow, same time schedule, same place, room
17 212.

18 Don't discuss the case among yourselves
19 or with anyone else. Follow the other rules that
20 I gave you and I know you have been following, and
21 we'll resume tomorrow.

22 Return safely tomorrow morning to the
23 courthouse. Thank you, you're excused.

24 (Whereupon, the sworn jurors exit the
25 courtroom.)

M. Suarez/People/Cross

(Handing to Counsel.)

Q. By the way, sir, did you have an opportunity to read this statement, which is Defendant's Exhibit B for identification, before you came here today?

A. I've read it several times.

Q. And you have a fairly good idea of what it said, what you wrote down?

A. Fairly.

Q. So when you started writing this out, you indicated that Tone started talking about money, right?

A. That's correct.

Q. That only he knew about, right?

A. That's correct.

THE COURT: Come up for a moment with regard to this.

(Whereupon, the following discussion takes place at sidebar among the Court and Counsel, outside the hearing of the defendant and sworn jurors.)

MR. IANNUZZI: I'm not going to read from it, if that's --

THE COURT: You're referring to the contents of the statement. You can't, it's not in evidence. If you want to put it in evidence, that's one thing.

M. Suarez/People/Cross

1 If you want to, you know, use it as a
2 prior inconsistent statement, then he has a right
3 to look at it. But you can't just keep referring
4 to its contents and, you know, use it that way,
5 because it's not in evidence.

6 MR. IANNUZZI: Okay.

7 THE COURT: You've got to make a
8 decision of what you want to do with it.

9 MR. IANNUZZI: I'm not going to put it
10 in evidence. I'm not going to read from it. I
11 might ask him a question about a prior
12 inconsistent statement contained in it, if he
13 makes one.

14 THE COURT: He has a right to look at
15 it.

16 MR. IANNUZZI: Sure. I only have one
17 copy of that.

18 MR. MCCARTHY: I'm just being alert as
19 to where we didn't go. If the examination goes
20 far enough, it will probably become admissible
21 under our application.

22 THE COURT: That's the only reason I
23 brought you up at this stage, so everybody knows
24 what they want to do with this thing. Okay.

25 (Whereupon, the following takes place in

M. Suarez/People/Cross

1 open court, in the presence of the defendant and
2 the sworn jury.)

3 THE COURT: You may continue.

4 Q. Did you tell Detective Hickey, or did you
5 write out for Detective Hickey that Tone --

6 MR. IANNUZZI: Withdrawn.

7 Q. Did you tell Detective Hickey that Tone was
8 talking about money that only he knew about?

9 A. That he knew was behind the counter.

10 Q. Right.

11 A. Yes.

12 Q. And Devon didn't mention the money to you,
13 did he?

14 A. No.

15 Q. And did you tell -- did you tell Detective
16 Hickey anything about going in the bathroom with Devon
17 and having a weapon, the magazine taken out, and seeing
18 bullets, and knowing the gun was loaded? You never
19 told that to Hickey, did you?

20 A. No.

21 Q. By the way, were the police telling you what
22 to say?

23 A. No.

24 Q. Were they giving you the words as to what
25 happened, or were you telling them what happened?

M. Suarez/People/Cross

1 A. They were helping me to an extent, to a
2 certain point --

3 Q. And did -- I'm sorry, I didn't mean to
4 interrupt you.

5 A. To a certain point, they were helping me
6 with certain parts of the statement.

7 Q. Were they telling you what happened?

8 A. No.

9 Q. You were telling them yourself in your own
10 words, right?

11 A. Yes.

12 Q. And did you tell Detective Hickey, at about
13 nine o'clock, on October 7th -- no, October 6th, did
14 you tell Detective Hickey at about nine o'clock on
15 October 6th that Tony handed -- passed you the gun?

16 A. That was an error due to my memory.

17 Q. Whether it was an error, or whatever it was,
18 that's what you told him, right?

19 A. Yes.

20 Q. You didn't tell him Devon gave you the gun,
21 you said Tony gave you the gun.

22 A. Yes.

23 Q. You said, Tony gave me, paren, Mike, you're
24 Mike, the gun; is that correct?

25 A. That's correct.

Smiddy - For People - Direct (McCarthy)

1 Mr. McCarthy, are we lined up for
2 another witness?

3 MR. MC CARTHY: Always at least one
4 more for you, Judge. Dr. Smiddy is next door.

5 THE COURT: Okay. People call Dr.
6 Smiddy?

7 MR. MC CARTHY: Dr. Monica Smiddy.

8 D R. M O N I C A S M I D D Y, a witness
9 called by and on behalf of the People, upon
10 being duly sworn, was examined and testified as
11 follows:

12 THE COURT: Dr. Smiddy, please keep
13 your voice up when answering questions.

14 Mr. McCarthy, you may proceed when
15 you're ready.

16 MR. MC CARTHY: Thanks, Judge.

17 DIRECT EXAMINATION

18 BY MR. MC CARTHY:

19 Q Good afternoon, Dr. Smiddy.

20 A Good afternoon, Mr. McCarthy.

21 Q Doctor, would you tell the jurors by whom
22 you're employed?

23 A I'm employed by the Office of the Chief
24 Medical Examiner here in New York City.

25 Q And in what capacity do you serve there?

Court's Charge

1 to decide on the basis of all the evidence in the
2 case.

3 So, for murder in the first degree, the
4 intent must be the intent to cause the death of
5 another person. That's the same for murder in the
6 second degree, intentional murder, and there is a
7 specific intent to forcibly steal, that's part of
8 felony murder, as you'll hear a little later on.

9 With regard to your determination of
10 intent, if you find that the defendant
11 intentionally shot Mr. Gerrald, it is not
12 necessary for the People to establish that the
13 intent to kill was present in the mind of the
14 defendant for any particular period or length of
15 time before the shooting. It is sufficient if you
16 find that the intent to kill was in the mind of
17 the defendant at the time of the shooting. The
18 element of intent to kill does not require a plan
19 to kill, nor premeditation under our law.

20 Now, according to the law, a person
21 commits robbery, and these are definitions
22 associated now with murder in the first degree,
23 according to the law, a person commits robbery
24 when he forcibly steals property. A person steals
25 property when he commits larceny or theft, and he

Court's Charge

1 does so with the intent to deprive another of that
2 property, and then wrongfully takes, obtains or
3 withholds it from an owner.

4 A person forcibly steals property when
5 in the course of committing a larceny or theft, he
6 uses or threatens the immediate use of physical
7 force upon another person for the purpose of
8 preventing or overcoming resistance to the taking
9 of the property.

10 A person wrongfully takes property when
11 he does so without permission of the owner or any
12 legal authority to take the property, and then
13 takes it and exercises dominion and control over
14 it for any period of time in a way that's totally
15 inconsistent with the rights of the owner.

16 And under the law the term owner means
17 anybody, any person who has a right to possession
18 of property greater than that of any alleged
19 taker, obtainer or withholder of it.

20 Now, since the statutory definition of
21 murder in the first degree also includes the
22 requirement that the victim be killed while the
23 defendant was in the course of committing or
24 attempting to commit a robbery, or while in flight
25 therefrom, I need to just define for you what an